FEB 20 1952
CHARLES ELMORE CROP
CLERK

IN THE

Supreme Court of the United States

October Term, 1951

No. 599

LUDWIG H. SAUER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ROBERT W. KENNY,
250 North Hope Street,
Los Angeles 12, California,
Counsel for Petitioner.

KENNY & MORRIS,
250 North Hope Street,
Los Angeles 12, California,

ARVEY, HOUDE & MANTYNBAND,
1 La Salle Street,
Chicago 2, Illinois,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

DARK PAGE

SUBJECT INDEX

	PAGE
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	6
Reasons for granting the writ	7
Conclusion	9

Appendix A. Tabular Digest of Cases.

BLEEDTHRU

TABLE OF AUTHORITIES CITED

Cases	Page
Brown v. Luster, 165 F. 2d 181	7
Dodds v. Williams, 163 F. 2d 724	7
Harrison v. Greyvan Lines, 331 U. S. 704	8
Heller v. Inter-Boro Sav. and Loan Assn., 166 F. 2d 83	7
Hudspeth v. Esso, 170 F. 2d 418	7
Karas v. Kleni, 70 Fed. Supp. 469	7
Kay v. General Cable, 144 F. 2d 653	7
King v. S. W. Greyhound Lines, 169 F. 2d 497; cert. den. 335 U. S. 891	7
Lee v. Remington Rand, 68 Fed. Supp. 837	7
Levine v. Berman, 161 F. 2d 386; cert. den., 332 U. S. 792	8
Loeb v. Kivo, 169 F. 2d 346; cert. den., 335 U. S. 891	7
MacMillan v. Montecito Country Club, 65 Fed. Supp. 240	7
Rosenbaum v. Ceco Products, 172 F. 2d 33; affg. 84 Fed. Supp. 954	7
Rutherford Food Corp. v. McComb, 331 U. S. 722	8
Travis v. Schwartz Manufacturing Company, 20 C. C. H. Labor Cases, par. 66,501	7
United States v. Silk, 331 U. S. 704	8

Statutes	
Labor-Management Relations Act (29 U. S. C., Sec. 152(3))	9
Selective Training and Service Act of 1940, Sec. 8 (54 Stats. 890)	2
Social Security Act (Gearhart Amendment, 62 Stats. 438, amending 26 U. S. C., Secs. 1426(d), 1607(i))	9
United States Code, Title 28, Sec. 1254(1)	1
United States Code, Title 42, Sec. 1301(a)	9

DARK PAG

PAGE

United States Code, Title 50, App., Sec. 308 2

United States Code, Title 50, App., Sec. 459 3

Universal Military Training and Service Act of June 24, 1948 (amended June 19, 1951, 82d Cong., 1st Sess., Chap. 144, Pub. Law 51) 3

TEXTBOOKS

Aspley, Sales Manager's Handbook (6th Ed., Chicago), p. 395 8

3 Sixteenth Census of the United States (1940), Table 58, p. 76 8

BLEEDTHRU

IN THE

Supreme Court of the United States

October Term, 1951

No.....

LIONEL H. SANGER,

Petitioner,

vs.

THE PLOMB TOOL COMPANY, a corporation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on December 13, 1951.

Opinion Below.

The oral opinion of the District Court [R. 220] is unreported. The opinion of the Court of Appeals [R. 238] has not yet been reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on December 13, 1951 [R. 248], and a petition for a rehearing was denied on January 4, 1952 [R. 249]. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

Question Presented.

Whether a traveling salesman paid by commissions is entitled, as an honorably discharged veteran, to re-employment.

Statute Involved.

Selective Training and Service Act of 1940, Section 8, 54 Stat. 890, as amended, 50 U. S. C. Appendix 308, the pertinent provisions of which follow:

> "(a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service * * * shall be entitled to a certificate to that effect upon the completion of such period of training and service, * * *
>
> "(b) In the case of any such person who, in order to perform such training and services, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service * * *
>
> "(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;
>
> * * * * * * * *
>
> "(e) In case any private employer fails or refuses to comply with the provisions of subsection (b)

> * * * the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. * * *"

These provisions have been reenacted by Congress in the Universal Military Training and Service Act of June 24, 1948, as amended by Act of June 19, 1951, 82nd Congress, 1st Session, c. 144, Public Law 51, 50 U. S. C. Appendix 459.

Statement.

Petitioner sought a mandatory injunction compelling his reinstatement in the employ of the respondent and incidental damages sustained from loss of commissions due to respondent's denial of his application for reinstatement made within 90 days after he was relieved from service in the naval forces of the United States.

The District Court ordered respondent to reinstate petitioner as its sales manager in the Kansas City territory [R. 20] and found that he was entitled to damages [R. 18].

The Court of Appeals reversed this judgment upon the sole ground that the District Court erred in concluding that petitioner was not an independent contractor. The

Court of Appeals ruled that petitioner had no reemployment rights under the Selective Service Act [R. 243].

Petitioner joined respondent's sales force in 1932 [R. 29-31, 164], after respondent made arrangements to get him some other line to help carry him while he was opening up the midwest territory for respondent [R. 31]. From 1932 to November 1942, when he joined the Navy, petitioner sold respondent's merchandise in the midwest territory [R. 12]. He continued to carry the other lines but over half his commissions were derived from respondent's merchandise [R. 242].

Until 1938 petitioner did not have any written contract with the respondent corporation [R. 39]. In the 1938 contract he was denominated "salesman"; in 1939, "representative," and from 1941 on, "manufacturers representative" [R. 167]. This final contract was terminable upon 30 days' notice and contained a provision, absent in the previous contracts, that "no employer-employee relationship is established by this writing." However, respondent's president testified that the changes in nomenclature were "purely a device of words, and did not in any way alter the relationship" between the parties [R. 167] which had not, in fact, been changed from the time petitioner first came into the company [R. 166].

This same official informed the United States Government in 1942 that petitioner had been "district manager" of his company for many years [R. 181]. Respondent paid petitioner's expenses to attend a sales meeting [R. 44]; gave him an "employee's" service pin [R. 46, 184];

sought his picture in uniform to be printed in the company house organ [R. 55, 56]; and deducted money from his commissions to build an employee's club house [R. 49, 185].

The Court of Appeals gave weight to the fact that petitioner "solicited orders from whatever customers he selected and * * * determined his own working hours, sales routes, and itineraries, using whatever selling techniques he desired" [R. 242].

However, petitioner was requested by respondent corporation to make reports concerning his itineraries although he did not follow any regular reporting plan as requested [Ex. 50, 6(e); pre-trial stipulation].

Respondent corporation from time to time furnished petitioner names and customers in his territory and he reported to respondent regarding the same [*ibid.*, 6(e)].

From time to time respondent corporation requested petitioner to report to it upon his activities in collecting past-due accounts. The corporation had the final authority on extension of credit to customers [*ibid.*, 6(h)].

Petitioner made suggestions to appellant corporation to improve its sales [R. 84]. He assisted the designing of many special tools [R. 181].

His duties even included repair and maintenance work on the company's display boards [R. 102].

In order to do this work, petitioner was furnished a complete tool kit with varnish and paint and brackets by the corporation. He was given another kit to repair

work by er	Year veteran went on job	Social Sec. Tax Deducted	Assistants paid by veteran
	1942		
	1938		
	do		
ide"	1939		
	1931	Yes	
	1941		
	1941		
	1939		
	1939		
	1942		
	1941		
	1941	No	
	1941		
	1939		
	1933	No	Yes
	1936		
	1943		Yes
	1940	No	Yes
	1942		
	1941		
	1942		
	1942		
	1932	No	Yes
paid rent			Yes
	1936	No	